

IN RE HARDIN COUNTY, OHIO

RCRA (3008) Appeal No. 93-1

FINAL DECISION AND ORDER

Decided April 12, 1994

Syllabus

U.S. EPA Region V appeals from an order denying the Region leave to amend a complaint to charge Hardin County, Ohio, with violations of State and Federal hazardous waste regulations promulgated under § 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928. The proposed amended complaint avers that Hardin County disposed of wastewater treatment sludges containing hazardous waste in 1983-1987 without a RCRA permit or interim status. The sludges were deemed hazardous waste by virtue of the identical State and federal RCRA "mixture rules," which provide that certain mixtures of hazardous and non-hazardous waste must be managed as hazardous waste.

This is the second appeal in this case. Region V previously appealed an order dismissing the original complaint, which alleged only violations based on the federal mixture rule. The Presiding Officer dismissed the original complaint in light of the invalidation of the federal mixture rule in *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991). In doing so, the Presiding Officer held that the D.C. Circuit declared the mixture rule void *ab initio*, rejecting the Region's argument that invalidation applied only prospectively. On appeal, the Board concluded that the status of the federal mixture rule might not be determinative, because if disposal occurred during the time the State of Ohio was authorized to administer its RCRA program, only the State mixture rule was applicable. Because the record was unclear as to precisely when the disposal occurred, the Board remanded the case for determination of the dates of disposal. *Hardin County, OH*, RCRA (3008) Appeal No. 92-1 (EAB, Nov. 6, 1992).

On remand, the parties stipulated that disposal occurred during periods when Ohio was authorized to administer its RCRA program, and during periods when Ohio was not authorized. The Region moved to amend the complaint to add allegations based on the State mixture rule. The Presiding Officer denied the amendment as futile, affirming his initial order, and concluding that under applicable regulations and Agency guidance, the State mixture rule could not be enforced by the Region.

Held: The decision of the Presiding Officer is affirmed. First, the Board concludes that the D.C. Circuit in *Shell Oil* intended for invalidation of the federal mixture rule to apply *ab initio*. Thus, there was no federal mixture rule in effect during the time Hardin County allegedly disposed of hazardous waste. Second, the Board concludes that the State mixture rule is unenforceable by the Region, because under Agency enforcement guidance the State rule is "broader in scope" than the federal RCRA program without a mixture rule, and thus exceeds the scope of EPA's enforcement authority. Accordingly, the Region's complaint must be dismissed with prejudice.